

ARBITRATION DECISION NO.:

272

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Youth Services

DATE OF ARBITRATION:

June 1, 1990

DATE OF DECISION:

July 2, 1990

GRIEVANT:

Leslie Garner

OCB GRIEVANCE NO.:

35-02-(89-11-14)-0012-01-03

ARBITRATOR:

Patricia Thomas Bittel

FOR THE UNION:

Ronald Stevenson

Robert W. Steele

FOR THE EMPLOYER:

Deneen D. Donough, Advocate

Sally P. Miller, Second Chair

KEY WORDS:

Removal

Client Abuse

Notice of Possible Discipline

Stipulated Issue

ARTICLES:

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

Article 25 - Grievance

Procedure

FACTS:

The grievant was a Youth Leader employed by the Ohio Department of Youth Services with four years experience. Two youths he was to supervise were engaging in horseplay or fighting in the dormitory of the facility. The grievant demanded that they stop but the youths disregarded his command. He then attempted

to get the youths' attention with a plastic milk crate. The grievant either lost control of the crate or threw it at the youths and it hit one of them. The youth received five sutures from being struck with the crate.

The grievant was subsequently removed for violating work rule B-19 prohibiting abuse of youth entrusted to the department. Also given as the basis for removal was Ohio Revised Code section 124.34.

EMPLOYER'S POSITION:

There was just cause for removal of the grievant. He clearly threw a milk crate at two youths whom he is charged with protecting. The youths were engaging in horseplay and disregarded the grievant's commands to stop. In his frustration he threw the crate, hitting the youth. Proper procedure in this situation would be to call for help from another Youth Leader. Therefore this act is abusive and a failure of good behavior.

This incident is another in a pattern of abusive behavior for which the grievant has received five and ten day suspensions. Progressive discipline is therefore not violated. No disparate treatment is present. Another employee cited by the union was not similarly situated. She was working a double shift and the youths had been out of control since the first shift.

The fact that the notice of removal did not cite the contract does not constitute lack of notice or impair just cause. The employer gave as the basis for removal: 1) work rule B-19; and 2) Ohio Revised Code section 124.34. Although the standard may be lower for the work rule and the Code, contractual just cause existed for removal of the grievant.

UNION'S POSITION:

The grievant did not intentionally throw the milk crate at the youths. The youths were engaging in horseplay, and not listening to the grievant's commands to stop, when the grievant had to use the milk crate to get their attention. The grievant's hand slipped and the crate fell, causing the injury. This does not constitute abuse of the youth.

The grievant in this case received disparate treatment. Another employee who struck a youth with a milk crate in a similar situation received a verbal reprimand. The employer, using work rule B-19 and Ohio Revised Code section 124.34 violated the contractual just cause standard. The provisions cited by the employer for removal use a lower standard, therefore, contractual just cause was not used to remove the grievant.

ARBITRATOR'S OPINION:

There was just cause for removal of the grievant. The grievant has given three statements concerning what occurred the day of the incident. His first two make no mention of merely losing control of the milk crate that hit the youth but state that he "flipped" it into a row of chairs. Therefore, the grievant's later statements are not credible in the face of his prior statements and from testimony of others presented concerning the incident. It is clear that the grievant was frustrated at being ignored by the youths and that he intended to throw the crate toward them. This action is reckless and in disregard of his responsibility to protect the youths.

The employer did not cite the contract in removing the grievant. However, use of work rule B-19 and Ohio Revised Code section 124.34 did not prejudice the grievant by reducing the just cause standard. Likewise, progressive discipline was not violated. The grievant has received five and ten day suspensions for a violation of the same work rule. He should have anticipated a possible removal for another violation. Specific notice may be required under different circumstances, if the grievant was in physical danger, as in the case cited by the union. However, this grievant was in no danger and directly caused injury to those he was to protect.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

July 2, 1990

In the Matter of Arbitration
between

The State of Ohio

and

**Ohio Civil Service Employees
Association, Local 11,
AFSCME, AFL-CIO**

Grievant:

Leslie Garner

Case No.:

35-02-(11-14-89)12-01-03

APPEARANCES

For the Union:

Ronald Stevenson,
Staff Representative
Dannie Fairley,
President/Chief Steward
Leslie A. Garner, Grievant
Robert W. Steele,
Staff Representative

For the State:

Deneen D. Donough, Advocate
Sally P. Miller, Second Chair
Rufus L. Thomas, Superintendent
Janet Willis, Unit Manager
Dennis Jones, Youth
Eddie McCrosky, Youth

Arbitrator:

Patricia Thomas Bittel

BACKGROUND

This matter was heard on June 1, 1990 at the offices of the Ohio Civil Service Employees Association in Columbus, Ohio before Patricia Thomas Bittel, the impartial Arbitrator mutually selected by the parties in accordance with Article 25 of the Collective Bargaining Agreement.

Buckeye Youth Center is a medium-security facility for delinquent boys run by the Ohio Department of Youth Services. On October 11, 1989 a youth, [hereinafter referred to as B.M.], was escorted to the clinic with a laceration over his right eyebrow. He was taken to a local hospital where he received five sutures. Medical records show he reported being struck by a plastic crate. B.M.'s statement dated 10-11-89 was as follows:

"I, [B.M.], was sitting . . . in the back row and youth [A.S.] jumped on me and was playing with me and [Grievant] come saw [sic] and throw a crate and someone told me to look out and when I got up I felt something hit me and my head started bleeding."

Grievant, an employee at the Center since November of 1986, was B.M.'s youth leader at the time. The youth leader is directly responsible for the care and protection of the youth assigned to him.

Grievant submitted three reports of the incident. The first, dated the same day, stated youths B.M. and A.S. were fighting in the dormitory TV area after the morning school session. Grievant claimed he told them to break it up and when they did not, grabbed a crate and "started to flip it in the second row where no one was at The statement described A.S. as pushing B.M. on the chair, and said "I . . . was in the process of letting go of the crate to the second row by spining [sic] it. I then try to put it down to floor of third row." B.M. was described as bending over trying to get up from his chair when hit by the crate.

The Critical Incident Report filed by Grievant the day of the incident also described B.M. and A.S. as fighting. After advising the youths to stop, Grievant reported he picked up a crate "to flip it into second row". A.S. was stated to have pushed B.M. into a chair on the third row. "I . . . try to put it to the floor in front of the chair which was in front of me at the same time youth [B.M.] who was bending over trying to get up was hit . . ."

Grievant's third statement, submitted the following day, described the youths as calm. He said he picked up a crate and "I started spinning it as I walked down the hall." He said he stood behind the chairs spinning the crate and saw B.M. and A.S. fighting. After telling them to break it up, he said he lost control of the crate and it fell directly in front of him. A.S. pushed B.M. into a chair and the crate inadvertently hit B.M., according to the statement.

The youths present at the time of the incident were also interviewed. D.J. said B.M. and A.S. were horseplaying when Grievant picked up a crate and threw it at them.

E.M. said A.S. and B.M. were horseplaying and Grievant "tossed a crate underhand to get their attention." The toss was described as slow.

R.A. stated B.M. and others were talking loudly and that he saw Grievant throw a crate. J.U. stated B.M. and A.S. were horseplaying and Grievant "picked up a crate and tossed it at them and hit Marshall in the eye."

According to A.S., he and B.M. were cracking jokes and making noise "so we started to laugh real loud and I was laughing so much that I fell all over [B.M.] and we both fell so I got up and all of a sudden [B.M.] was hit by a crate."

S.H.'s statement described A.S. and B.M. as "cracking jokes and laughing and playing" when Grievant "threw a milk crate for no reason at all". He said he tried to kick it while it was in the air, but missed.

R.T. said B.M. and A.S. were horseplaying and Grievant first asked them to stop, then yelled. "[Grievant] then picked up a milk crate and flipped it over towards the wall and [B.M.] was running away from the crate because he thought [Grievant] was throwing it at him and the crate hit him in the eye and he started bleeding."

The stipulated documents included Grievants' disciplinary and performance history. His appraisals indicate his performance is of very high caliber; he was also given an honorable discharge after ten years' service in the Army. As to discipline, he received a five-day disciplinary suspension in August of 1987 for physical abuse of a youth and failure to report the incident. He also received a disciplinary suspension of ten working days in June of 1989 for physical abuse of a youth "by hitting him in the face and on his head." The suspension letter further stated "any further infractions of this nature may result in a more severe disciplinary action".

The work rule alleged to have been violated is as follows:

"Employees participating in the following activities shall be considered to be in violation of the Department of Youth Services Work Rules: 1. Abusing or mistreating youth entrusted to the Department's care"

The parties have also stipulated to the following issue: "Was the grievant discharged for just cause? If

not, what shall the remedy be?"

CONTENTIONS OF THE STATE

The State argued the stipulated just cause issue preempts any argument from the Union of procedural impropriety.

According to the State, two youths were horseplaying when Grievant threw a milk crate at them to break it up. It claims Grievant intended to throw the crate at the youths to get their attention because he was frustrated at their failure to respond to his command. The State argues it was no accident that the crate went in the direction of the youths; it maintains the injury could and should have been expected.

Throwing crates at youths is clearly abusive, argues the State, and at the very least constitutes mistreatment. It certainly falls within what can fairly be described as a failure of good behavior, asserts the State. Such an action is contrary to the responsibility of the Department to provide youths with a safe environment, it claims.

Superintendent Thomas testified he considered the incident to be mistreatment because the result was a severe injury and an inappropriate method of intervention was used to break up fighting and horseplay. He stated the proper procedure is a verbal command to stop, followed by a call for help by phone or walkie-talkie.

Two youths testified on behalf of the State. E.M. stated the youths were horseplaying, and Grievant threw the crate in their direction. He said Grievant was looking at the youths when he threw the crate, and claim he could see Grievant's face at the time. One youth moved out of the way and it hit the other, he stated. He described Grievant as "frustrated" when he threw the crate.

D.J. also testified, stating Grievant tossed the crate towards the window screen behind the horseplaying youths "to scare them".

The State argues Grievant's conduct in this instance was part of a consistent pattern of responding to difficult situations with abusive behavior. The State responded to an assertion by the Union that Grievant received disparate treatment. Grievant's conduct was compared to that of Youth Leader Annette Ross, who received a letter of verbal reprimand with no suspension. The letter stated "you threw a milk crate at youths during meal time. One of the crates struck a youth in the face who had to be taken . . . for treatment."

The State first points out Ross was working a double shift with youths who had been out of control since her first shift. Next, it claims the crate was not thrown at the youths directly but bounced off a wall. Third, it claims Ross had no prior instances of discipline. It distinguishes Grievant's situation as he had received two prior suspensions for related behavior.

The State argues Grievant's removal was progressive and there was just cause. It submitted six arbitration decisions by panel arbitrators in support of its position. Each of these decisions involved removal of an employee, one for sleeping, five for felony convictions. In each of these cases, the Arbitrator found that the notice deficiencies cited by the Union did not constitute an impairment to just cause.

CONTENTIONS OF THE UNION

The Union protests the fact that Grievant's notice of removal charged him with "failure of good behavior in violation of work rule B-19 and Section 124.34 of the Ohio Revised Code." It argues this constituted a lesser standard than that in the Collective Bargaining Agreement, requiring the discharge to be overturned. In support of this contention it submitted a decision by Panel Arbitrator Pincus regarding a similar removal order which cited the Ohio Revised Code Section 124.34, but not the Collective Bargaining Agreement. Pincus found the Employer had just cause to discipline Grievant, but modified the penalty, finding the Removal Order defective.

In the Union's view, A.S. and B.M. were engaged in horseplay and possibly fighting at the time of the incident. Grievant picked up the milk crate and began flipping it, claims the Union. It asserts that in the confusion of the horseplay or possible fighting, Grievant lost control of the crate. It was not thrown directly at the youths, it claims.

Grievant testified he saw A.S. and B.M. in a lock punching each other, and "hollered" at them to stop. At the time, he said he was flipping a crate with a backward motion. His hand slipped and the crate fell, stated Grievant, with the crate hitting B.M. as he rose from a chair. Grievant asserted the crate was not thrown, and described the incident as a "fluke accident."

The Union points out Ross received a verbal reprimand for identical behavior, and claims Grievant's removal constituted disparate treatment. It further claims the discipline was not commensurate with the offense. As a remedy, the Union advocates the grievance be sustained, and with Grievant's record expunged of the discipline involved. It asserts Grievant should receive full back pay, including holidays and missed overtime opportunities.

DISCUSSION

A. Alleged Procedural Deficiency

The Union is correct in pointing out that Grievant's Notice of Removal failed to cite any provisions from the Collective Bargaining Agreement; rather, it cited B-19 of the General Work Rules, Section 4, Rule 1 regarding abuse or mistreatment of youth. It also cited Section 124.34 of the Ohio Revised Code, which provides for removal for "failure of good behavior" and "malfeasance."

In the view of this Arbitrator, any procedural deficiency in Grievant's Notice of Discipline is minimal and in no way prejudiced Grievant's position. As to progressive discipline, he had already received two disciplinary suspensions for the same rule violation cited in his Notice of Discipline. The concept of progressive discipline entails a predictable weakening of the Employer's endurance of repeated rule violations. The Grievant should have anticipated that a third violation of the same rule could well result in his removal; no specific prior notice was necessary.

The Pincus decision cited by the Union must be distinguished due to the nature of the specific offense. That case concerned an employee's refusal to work on grounds of physical endangerment, a situation quite different from Grievant's here. The Grievant in this case was accused of directly causing injury to persons he was charged with protecting. Express notice that removal could be a consequence of such behavior was not necessary; Grievant should have anticipated this result without prior notification.

B. Determination of Just Cause

The evidence has clearly established that B.M. and A.S. were involved in horseplay and rough-housing. It is further clear from the evidence that the Grievant verbally commanded the two youths to stop their rough-housing and they did not. This situation by its very nature adds credibility to the State's theory that Grievant was frustrated. He had already attempted to break up the horse play verbally without success. His commands were being ignored and the rough-housing continued as if he were not even there. Grievant's testimony that he continued watching and spinning a crate after "hollering" at the youths is lacking in credibility. It is more believable that he threw the crate towards them in order to get their attention.

It is clear from the testimony that B.M. was getting out of a chair when hit by the crate. It follows that he was in the chair at the point in time when the crate would have left Grievant's hands. Most witnesses testified B.M. was in the chair because he had been pushed down as part of the horseplay.

Grievant's testimony differs in his three reports on the point of how the crate left his hands. In two of his reports, he stated he was flipping it into the second row. These statements imply both aim and intent to throw the crate.

In another statement, Grievant said he lost control of the crate. His failure to mention the alleged loss of control in either of the first two statements, taken most recently after the incident, is telling. If the accident resulting in serious injury to a youth actually occurred because he lost control of the crate, one could reasonably expect Grievant would mention this fact in his first two statements. However, in both his first statement and his Critical Incident Report he said he picked up a crate, "to flip it into second row." Neither mentioned a loss of control.

Given the conflicts in testimony, as well as the general circumstances surrounding the incident, my finding

is Grievant deliberately threw the crate towards the rough-housing youths in an attempt to get their attention and break up their horseplay. This resulted in direct injury to one of the youths. Grievant did not call for help, the option he had been trained to employ. Clearly, he handled this situation improperly, resulting in injury to one of his charges. At the very least, his decision to toss a crate in a direction of the youths was reckless and in disregard of his responsibility to protect them from physical danger.

Given these facts, my finding is that the Employer had just cause to discipline the Grievant for this incident.

C. Existence of Mitigating Circumstances

Grievant had been employed with the Buckeye Youth Center for approximately four years at the time of his removal. He had been honorably discharged from the Army after ten years service. His performance appraisals indicate he was well above average in all categories. He had received two suspensions, the first, five days for abuse, and the second, a ten day suspension for abuse. No evidence or testimony was offered by either party as to the number or length of disciplinary suspensions in the progression of discipline at Buckeye Youth Center. There is no allegation or evidence that removal after two suspensions is disparate treatment compared with the number of suspensions given others.

Disciplinary suspension is a very severe penalty used at the later stages of the progressive disciplinary process to provide an employee with a narrowing opportunity for remediation. Despite two such serious warnings and a total of 15 days away from work to consider the seriousness of abusing youth, Grievant nevertheless affirmatively placed the physical safety of his charges at risk, resulting in actual physical harm. While his good performance and years of service weigh in his favor, they simply do not outweigh the seriousness of his past disciplinary suspensions for the same offense.

AWARD

The Grievance is denied. The Employer had just cause to discharge the Grievant in this case.

Respectfully Submitted,

Patricia Thomas Bittel,
Arbitrator

Dated: July 2, 1990